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No. 392

In the

Supreme Court of the United States

OCTOBER TERM, 1961

L. O. BELL,

Petitioner,

v.

F. W. WOOLWORTH COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOHN J. WATTS and TOM SNEED,
P. O. Box 1031,
Odessa, Texas.

ROBERT L. IVY,
Oil and Gas Building,
Fort Worth, Texas,
Attorneys for Petitioner.

WARLICK LAW, INC.—2263 VALDINA STREET—DALLAS—RI 1-6711

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L. O. Bell, prays that a Writ of Certiorari issue to review the judgment and action of the United States Court of Appeals for the Fifth Circuit, entered on the 7th day of July, 1961. Petition for rehearing was denied on the 25th day of July, 1961.

1.

OPINIONS OF THE COURT BELOW

The District Court did not render an opinion. The opinion of the Court of Appeals is unreported at the date of filing of this petition. Said opinion is attached hereto as Appendix A.

2.

JURISDICTION

Judgment of the Court of Appeals was entered on the 7th day of July, 1961. Jurisdiction of this Court is invoked under Article 28, U. S. C., Sec. 1254(1).

3.

QUESTIONS PRESENTED

I.

Whether a Court of Appeals may, in rendering judgment in a diversity case, apply substantive law which is directly contrary to the law of the State from which the case was appealed as declared by the Supreme Court of that State?

II.

Whether a Court of Appeals may render judgment denying recovery in a case where the evidence raised issues of fact for the jury and a jury verdict was in favor of the petitioner without denying to petitioner a trial by jury as required by the Seventh Amendment to the Constitution of the United States?

4.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

1. The Constitutional provision involved in this case is the Seventh Amendment to the Constitution of the United States reading as follows:

> "In suits at common law, where the value in controversy shall exceed $20.00, the right of trial by jury

shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

2. The statutory provision involved in this case is the Rules of Decision Act, 28 U. S. C. Sec. 1652 which reads as follows:

"The laws of the several states, except where the Constitution or treaties of the United States or acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the Courts of the United States, in cases where they apply."

STATEMENT

This was a diversity of citizenship case which arose from a serious accident occurring in Odessa, Texas, on the 4th day of January, 1958. On that date the petitioner's wife, Altie Bell, was a business invitee in the department store of the respondent, F. W. Woolworth Company, when she slipped on water negligently placed and permitted to remain upon the floor of the store. Mrs. Altie Bell was seriously and permanently injured in her fall to the floor of the store. The case came on for trial on the 12th day of October, 1960, and was tried to a jury and the jury returned a verdict in favor of the plaintiff in the amount of $30,000.00. During said trial plaintiff's wife, Mrs. Altie Bell, testified as follows regarding what it was that she slipped and fell upon:

"Q. You fell flat on your back. Feet slip out from under you?

"A. Yes, sir.

"Q. And did you look around and discover what had caused you to fall there after you had fallen?

"A. Yes, sir.

"Q. And what did you discover there, what did you see there that had caused you to fall?

"A. Water.

"Q. Was that a rather large puddle of water?

"A. Yes, sir, it was.

"Q. *Did it appear to be water like a small amount that would be tracked in, or a large amount like you would get from mopping?*

"A. *It was a large amount.*

"Q. And did you notice areas around you then, other areas (interrupted).

"Mr. Hardie:

"If the Court please, I am going to object to so much leading of the witness.

"The Court:

"Objection will be sustained. Counsel do not lead the witness.

"Mr. Watts:

"Q. Outside of this big puddle of water that you fell in, *did you see anything else around?*

"A. Yes, sir.

"Q. What else did you see?

"A. *I saw some more water.*

"Q. All right. *And what happened there after you had fallen on the floor?*

"A. *They mopped it up.*

"Q. They mopped it up?

"A. Yes, sir.

"Mr. Hardie:

"Your Honor, does my same objection go forward as to what happened after this accident?

"The Court:

"Yes. Let the record reflect that the Court understands that the objection that has heretofore been made by counsel is made to all this line of testimony without the necessity of him making a specific objection. Objection overruled. All right.

"Mr. Watts:

"Q. When you say they mopped it up, who mopped it up?

"A. *One of the janitors.*

"Q. Did you see that man near you, near the place where you had fallen?

"A. *He wasn't very far from me.*

"Q. *And what was he doing after you had fallen there?*

"A. He was mopping when I fell.

"Q. And did the store manager over here, come over there to you?

"A. Yes, sir.

"Q. And what instructions did he give this janitor?

"A. *He told him to mop it all up, and get it in the vestibule too.*

"Q. All right. Told him to mop it all up and get it in the vestibule too, is that right?

"A. Yes, sir.

"Q. And how far was this man with the mop from you when you fell?

"A. *About five feet.*" (R. 36 to 37.)

In addition to Mrs. Bell's testimony, the testimony of a store employee, one Mrs. Watkins, was received as follows:

"Q. *How long had it been raining before the accident?*

"A. *Well, I think it had been raining all day.*

"Q. *Do you or did you at that time have rubber mats at the front of the store for people to dry their feet on as they came in?*

"A. *I don't believe so.*

"Q. *You didn't have them there did you?*

"A. *No, sir.*

"Q. *And do you know that people when they come will track mud and water into a store where it has been raining all day, and they cause it to become slicky and dangerous and you have to go around and mop up those places from time to time on a day where it has been raining all day and where it is slushy, don't you?*

"A. Yes, sir.

"Q. And do you know that if you had rubber mats out there in front that people would dry their feet on them, that that would have helped to make *those floors safer* for people to use them don't you?

"A. Yes, sir.

"Q. And you all didn't have anybody out there requesting anyone to dry their feet or be careful, *or you didn't give them any opportunity to get that mud and slush off their feet before bringing into that store, did you?*

"A. We didn't have anyone out there. No, sir.

"Q. And whenever you get stuff like that on your feet, you just don't leave it in the doorway, but you track it all over the store don't you, after it has been raining and slushy all day long?

"A. Well, I imagine you would.

"Q. And you have people out there, whenever conditions are like this, that have to get out and mop from time to time to try to clean up those conditions, and to try to keep the floor clear, don't you?

"A. Yes, sir." (R. pp. 78-79.)

Mr. Wagner, the manager of the store testified as follows:

"A. He had been instructed to wipe up the water as it accumulated at the door. Well, he had a mop bucket with a wringer on it, so that he could dry out the mop.

"Q. Was he doing that on that day?

"A. He had been doing it, yes, sir.

"Q. Do you recall whether or not the store was crowded at the time?

"A. It was the Saturday after Christmas, it wasn't a very crowded day, no, sir.

"Q. Do you recall seeing a puddle of water this size anywhere on the floor around where Mrs. Bell was sitting or where she had fallen?

"A. *There was some water by the door, a sizeable portion.*

"Q. *How far from where she was?*

"A. *Approximately fifteen feet.*

"Q. *Was that near the entrance?*

"A. *Right at the door.*" (R. pp. 86-87.)

* * * * *

"Q. Didn't you testify in response to questions asked you by Mr. Hardie that that fellow Summers had been mopping up that floor all during the day because as Mrs. Watkins said it had been *raining all day and was a very slushy day?*

"A. I had asked him to mop the floor *periodically throughout the day.*

"Q. Well didn't you tell a while ago that he had *been doing that on this particular day?*

"A. Yes, sir.

"Q. And that is still true isn't it? Now did you tell him a while ago that you told him just to mop the floor in the front of the doorway?

"A. That was the only place where water was being carried in.

"Q. Now that is the only place you told him to mop is that right?

"A. *Well he was instructed to mop water wherever it was. When they spill something or something of that nature it was to be picked up. That is understood.*" (R. pp. 90-91.)

In spite of and in the face of such evidence showing clearly that the floor had been made excessively wet where Mrs. Bell fell and that a man who was right there in that vicinity failed to wipe it up and that water had been in the store throughout the day and that rubber mats should have been used or other precautions should have been taken, the Court of Appeals for the Fifth Circuit rendered their opinion holding that there was no evidence to support a jury verdict, the jury having returned a verdict in the amount of $30,000.00, and such verdict was reversed and rendered, the Court of Appeals holding that the petitioner should take nothing. Such judgment of the Court of Appeals was entered on the 7th day of July, 1961. Motion for rehearing was duly filed on behalf of petitioner and was overruled on the 25th day of July, 1961.

6.

REASONS FOR GRANTING WRIT

1. The decision of the Court of Appeals is not in accord with the applicable decisions of the Supreme Court of Texas. The holding of the Court of Appeals complained of is in direct conflict with the applicable decisions of the Texas courts, including the Texas Supreme Court. Since the Court of Appeals failed to follow the clearly established law of Texas a typical situation is presented in which This Honorable Court has granted writs of certiorari.

Erie R. Co. v. Tompkins, 304 U. S. 64;

Russell v. Todd, 309 U. S. 280;

Wichita Royalty Co. v. City National Bank, 306 U. S. 103;

Guaranty Trust Co. v. York, 320 U. S. 99;

See also *Rules of Decision Act, U. S. C., Section 1652.*

In *Dawes v. J. C. Penney Co., 236 S. W. 2d 624*, by the Supreme Court of Texas, we find an action by the plaintiff's wife to recover for injuries that were sustained when she *slipped on mud and water on a smooth terrazo entranceway to the defendant's store.* Evidence showed that the defendant had in its possession *rubber mats* which could be placed on the entranceway but that they had not been placed there at the time of the accident. Further, that the defendant knew that the floor became slippery when it rained; that other persons had slipped upon the slippery floor prior to the plaintiff's accident. The plaintiff testified

she knew that it was slippery, but that she did not realize it was as slippery as it actually was when she fell. The Trial Court held for the defendant and granted an instructed verdict. The Appellate Court ruled that the Trial Court erred in withdrawing the case from the jury; that the evidence was sufficient to uphold a finding of negligence on the part of the defendant; that the defendant had a duty to maintain the premises in a safe condition and that the plaintiff was not guilty of contributory negligence.

Another leading Texas case is that of *S. H. Kress & Company v. Dyer, 49 S. W. 2d 986, writ refused.* In this case by the Waco Court of Civil Appeals, the plaintiff, Mrs. Dyer, had slipped and fallen upon the floor of the defendant's store. The evidence showed that applications of oil had been made periodically to the floor and that the floor at the time of the accident, and for some time prior thereto, was well oiled and rendered slick and slippery. The Court in holding such evidence to be sufficient to sustain a jury verdict in favor of the plaintiff stated as follows:

> "Appellant owed Mrs. Dyer, a customer in its store, upon implied invitation to inspect and purchase its wares, the duty to maintain the floor thereof in a reasonably safe condition for walking to and fro thereon. Any dangerous condition of such floor arising from the manner in which it was maintained by appellant or its employees to whom such maintenance was entrusted, was a breach by it of such duty."

We therefore respectfully submit that the petitioner sustained the allegations of negligence wherein he alleged that the respondent's agents placed an excessive amount of water on the floor when they were mopping and in failing to dry

the floor prior to allowing the petitioner's wife to walk upon it and in failing to warn petitioner's wife that the floor was in a particularly dangerous condition when they knew or ought to have known from the evidence heretofore set out in the statement that such was true. The evidence heretofore set out in the statement clearly shows that the respondent's agents knew of the presence of water upon the floor; knew that the presence of such water upon the floor would make the floor slippery and dangerous; knew that upon a rainy day such as the one involved, rubber mats or other devices should have been placed to prevent water from being tracked in; knew that there was water at the very place where the petitioner's wife fell, as shown by the presence of an employee in the immediate vicinity and, yet, knowing these things, failed to take the proper precautions. The jury, having heard the evidence, determined that the respondent's agents were negligent, and we respectfully submit that such jury verdict should not be set aside and held for naught.

2. The action of the Court of Appeals deprived petitioner of his right to trial by jury, contrary to the Seventh Amendment of the United States' Constitution. This Honorable Court has recently re-affirmed its position with regard to the sanctity of the right to trial by jury in the case of *Byrd v. Blue Ridge Rural Electric Co-op., 356 U. S. 525; 2 Lawyers Edition 2, 953; 78 Supreme Court 893.* This was a case involving personal injuries sustained by the plaintiff in South Carolina when he was engaged in work constructing an electric company substation. Defendant claimed as a

defense that the plaintiff was a statutory employee and, therefore, that the defendant was protected by the workmen's compensation statutes. The District Court granted plaintiff's Motion to strike the defense and a jury verdict in favor of the plaintiff was rendered upon trial. The Court of Appeals directed an entry of judgment for the electric company and on Certiorari This Honorable Court reversed the judgment of the Court of Appeals and, at page 537, This Honorable Court stated through Justice Brennan as follows:

> "The federal system is an independent system for administering justice to litigants who properly invoke its jurisdiction, and an essential characteristic of that system is the manner in which, in civil common law actions, it distributes trial functions between judge and jury and, under the influence, if not the command of the Seventh Amendment, assigns the decision of disputed questions of fact to the jury."

Thus, it seems that as recently as 1958, This Honorable Court has seen fit to grant a Writ of Certiorari and reverse a case where the right of trial by jury was involved.

The United States Court of Appeals for the 9th Circuit, in *Smith v. Ruck, 245 Fed. 348*, stated:

> "In considering a case of this kind we should take note of the precedents established by the Supreme Court when it is proper to take a case from the jury. For although, this is a diversity case, it was tried in a federal court where considerations relating to the Seventh Amendment must prevail."

Professor Leon Green of the University of Texas, in June of 1957 wrote an article for the Texas Law Review

entitled "Protection of Jury Trial in Diversity cases", in which the following was said about the action of This Honorable Court. At page 770, Professor Green stated:

> "Thus, under the Supreme Court decision it would seem that when the right of jury trial in the federal court collides with Erie v. Tompkins, the Supreme Court as in the F. E. L. A. cases will stick with jury trial and not allow practices of any type designed to deprive a litigant of his Constitutional right.
>
> "Citing Dice v. Akron C. & Y. R.R., 342 U. S. 358, and Brown v. Western Ry. Co., 338 U. S. 294."

CONCLUSION

For the foregoing reasons, we respectfully submit that This Honorable Court should grant this petition for Writ of Certiorari to the end that on review the Court of Appeals may be directed to reverse its judgment.

Respectfully submitted,

JOHN J. WATTS and TOM SNEED,
P. O. Box 1031,
Odessa, Texas.

ROBERT L. IVY,
Oil and Gas Building,
Fort Worth, Texas,

By Robert L. Ivy
Attorneys for Petitioner.

A separate Certificate of Service as required will be furnished by counsel.

APPENDIX A

In the
UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 18744

F. W. WOOLWORTH COMPANY,

Appellant,

versus

L. O. BELL,

Appellee.

Appeal from the United States District Court for the Western District of Texas.

(July 7, 1961.)

Before TUTTLE, Chief Judge, and CAMERON and JONES, Circuit Judges.

TUTTLE, Chief Judge: Plaintiff-appellee, the husband of the injured party, brought this action in the District Court for the Western District of Texas, Pecos Division, for the personal injuries allegedly suffered as a result of Mrs. Bell's falling in a store owned and operated by appel-

lant. A motion for a directed verdict for the defendant[1] was denied and the case was allowed to be considered by the jury. A judgment was awarded appellee in the amount of $30,000.00. From the entry of that judgment the appellant brings this appeal.

The facts may be briefly summarized. Mrs. Bell, the plaintiff's wife, testified that on January 5, 1958, she entered appellant's store for the purpose of purchasing a cup of coffee. It had been raining and the streets were quite wet. After entering the store, she walked about half way to the coffee counter, then slipped and fell. She testified that after her fall she noticed a puddle of water where she fell and some other water nearby being mopped up by a porter. Other witnesses, the employees of the store, testified that the floor was completely dry at the point of her fall.

It is well established by the Courts of Texas that "when injury is caused by a foreign substance upon a floor which

---

[1]The motion, so far as here relevant, was based on the grounds:

3.

The evidence of probative force wholly fails to show that this defendant had knowledge of the presence of any foreign substance or debris or water on the floor of its Odessa store near the place where plaintiff fell. There is no evidence of probative force to show how long the foreign substance or water had been on the floor of the defendant's store, or that in the exercise of ordinary care this defendant should have known of the presence of such matter on its floor.

4.

The whole of plaintiff's evidence in this case fails to show that the object on its floor was placed there by this defendant or that whatever substance was on the floor was placed there by this defendant or that the presence of such matter on its floor should have been known to defendants, or that such matter had been there for such a time as that in the exercise of ordinary care defendant should have discovered the presence of such foreign matter or water or debris on its floor. The whole of the burden of proof here is upon the plaintiff to show the presence of such danger and that this defendant knew or should have known thereof, and that this defendant was negligent in maintaining its presence in such a condition. There has been a complete failure of proof to show such pertinent facts required.

rendered it slippery or unsafe for use" the party asserting the liability of the owner of the premises must establish:

> "1. That the defendant put the foreign substance upon the floor, or
>
> 2. That the defendant knew the foreign substance was on the floor and wilfully or negligently failed to remove it, or
>
> 3. That the foreign substance had been upon the floor for such a period of time that it would have been discovered and removed by the defendant, had the defendant exercised ordinary care." *H. E. Butt Grocery Co. v. Johnson*, 226; S.W. 2d 501, at 502; see also *Beard v. Henke & Pillot, Inc.*, 314 S.W. 844, at 845, *O'Neal v. J. Weingarten, Inc.*, 328 S.W. 2d 793, at 794.

Upon a careful reading of the testimony offered during the course of the trial, we are forced to the conclusion that the appellee totally failed to introduce evidence which might satisfy the requirements of the Texas rule which we have set out above. There was no proof of any kind that the management knew of the presence of the water; nor was there any proof showing how long the water had been on the floor. Having failed to meet that burden placed upon him, it must follow that the appellee was not entitled to recover for the injuries suffered by his wife and that the trial court erred in refusing to grant the appellant's motion for an instructed verdict.

Accordingly the judgment entered by the District Court must be REVERSED and the cause REMANDED for the entry of a judgment for the defendant.

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BRIEF FOR RESPONDENT IN OPPOSITION

WILLIAM L. KERR,
300 First National Bank Building,
Midland, Texas.

MAX N. OSBORN,
300 First National Bank Building,
Midland, Texas,
Counsel for Respondent.

TURPIN, KERR, SMITH & DYER,
P. O. Box 913
Midland, Texas,
Of Counsel.

WARLICK LAW, INC.—2263 VALDINA STREET—DALLAS—ME 1-3130

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit (Appendix A of Petition) is reported at *291 F. 2d 912.*

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

1. Whether the Court of Appeals properly applied the applicable rules of Texas substantive law to the case in reaching the conclusion that there was no liability upon the part of a store owner in a diversity of citizenship case resulting from a slip and fall.

2. Whether the Court of Appeals, in a case where no jury issue existed, violated Petitioner's rights under the Seventh Amendment to the Constitution of the United States by ordering judgment for the Respondent.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Constitution of the United States (Seventh Amendment thereto) and the statute involved, the Rule of Decisions Act *(28 U. S. C., Section 1652)*, are set forth in the Petition, at pages 2 and 3.

STATEMENT

This is a common law negligence "slip and fall" case, involving a Texas accident, which was filed in a United States District Court because of the diversity of citizenship between the parties. No federal question existed, and the case was tried and determined on appeal under Texas substantive law.

On January 5, 1958, Petitioner's wife, Mrs. L. O. Bell, a 49-year old lady, entered Respondent's store in Odessa, Texas, for the purpose of getting a cup of coffee (R. 32, 34). She entered the store at about 11:30 a.m., at which time it was

raining and slushy outside (R. 43, 75). She had entered the north door and was going to the coffee counter on the south side of the building and had walked half way across the store which had an asphalt tile floor (R. 46). She was going straight down the aisle and did not notice anything wrong with the floor or any dangerous condition before she fell (R. 46, 35). According to her testimony her feet slipped out from under her, causing her to fall (R. 36). She said that after the fall she noticed a rather large puddle of water where she fell and she also saw other water on the floor (R. 36). She said they mopped up the water after she fell (R. 37).

Mrs. Bessie Watkins, Respondent's floor supervisor, was on duty the day of the accident and saw Mrs. Bell shortly after she fell (R. 73, 74). She inspected the area where Mrs. Bell fell and did not see any water or debris on the floor. At that place in the store the floor was absolutely dry (R. 75).

The store manager, Mr. Wilbur J. Wagner, testified that he was in the store office when he was notified about the accident (R. 84). He immediately went downstairs and saw Mrs. Bell at the front of the store about 15 feet from the north entrance. Mrs. Bell told him she was in a hurry to get some coffee and fell (R. 85). He inspected the floor and it was perfectly dry (R. 85). There was no debris or foreign substance on the floor (R. 85).

There was no testimony that Respondent's employees put the water on the floor where Mrs. Bell claims to have fallen.

She never testified that it was placed there by anyone mopping. In fact, she said:

> "Q. And when you got in there, did you notice anything particular wrong, before you fell, with the floor?
>
> "A. I noticed a boy mopping.
>
> "Q. I mean before you fell.
>
> "A. No, that was after I fell" (R. 34).

Thus, by her own testimony, the mopping was after she fell, and she did not see any water, even if it be admitted that some was present, and could have *no* knowledge as to how it got there, or how long it had been there.

Petitioner also makes reference to testimony from one witness concerning failure to provide rubber mats in the store, and subsequently cites cases on this issue. The Court's attention is directed to Paragraph 4 of plaintiffs' original complaint (R. 3) and the fact that no allegation of negligence is made concerning a failure to furnish rubber mats. The trial court did not instruct the jury concerning any negligence in this connection (R. 103), nor was any request made that such an instruction be given (R. 113, 114). Thus, no jury issue arose in regard to the failure to furnish rubber mats.

ARGUMENT

The Court of Appeals Correctly Determined and Applied the Applicable Substantive Law of the State of Texas in Determining That Respondent Was Not Liable to Petitioner

The applicable substantive law of the State of Texas concerning the duties of a store owner to an invitee upon its premises is clearly set forth in many cases decided by the

courts of this State. Certainly the owner of the premises is not an insurer of the safety of its invitees. *McElhenny v. Thielepape (Texas S. Ct., 1956), 155 Tex. 319, 285 S. W. 2d 940; S. H. Kress & Co. v. Telford (5 Cir., 1957), 240 F. 2d 70.* Likewise, a proprietor's duty does not compel perfection, nor must he render accidents impossible. *Camp v. J. H. Kirkpatrick Co. (Tex. Civ. App., 1952, writ refused, n.r.e.), 250 S. W. 2d 413.* Furthermore, negligence in this type case is never presumed from the mere fact of accidental injury. *S. H. Kress & Co. v. Telford,* supra.

In order to establish liability against the operator of a store, it is necessary to show:

> "1. That the defendant put the foreign substance upon the floor and wilfully or negligently failed to remove it, or
>
> "2. That the defendant knew the foreign substance was on the floor and wilfully or negligently failed to remove it, or
>
> "3. That the foreign substance had been upon the floor for such a period of time that it would have been discovered and removed by the defendant, had the defendant exercised ordinary care." *O'Neal v. J. Weingarten, Inc. (Tex. Civ. App., 1959, writ refused, n.r.e.), 328 S. W. 2d 793, 794.*

In the case at bar there is no testimony that Respondent put the water, which Mrs. Bell claims caused her to fall, on its floor. Certainly there is no indication that anyone had spilled water on the floor and no testimony that the porter put the water on the floor. In fact, Mrs. Bell, who was the only witness that even said the porter was present, said she didn't

even see him there until after she fell (R. 34). Thus, the first basis for liability need not be considered further.

Likewise, as to the second proposition upon which liability can be made to rest, that the Respondent knew the foreign substance was on the floor and negligently failed to remove it, there is no evidence to establish a prima facie case. Both of Respondent's employees denied that any water was ever present where Mrs. Bell fell. Certainly the Petitioner did not give any testimony which would establish that Respondent had actual knowledge of the condition which Mrs. Bell described as causing her to fall.

There is also a complete lack of evidence to bring Petitioner within the third basis upon which liability could be established. Even accepting Mrs. Bell's testimony fully and completely, concerning the condition which she described, there is nothing in that testimony to show the period of time the water she described was upon the floor. Thus, there are no facts from which a jury can determine whether Respondent should have discovered the foreign substance by exercising ordinary care, and no case of liability is made out against the store owner.

One of the most recent cases in Texas concerning a slip and fall case involving water on the store owner's floor is *Furr's, Inc. v. Martin (Tex. Civ. App., 1956, no writ noted), 296 S. W. 2d 607.* Although that case involved a question of venue, the substantive law of the State was discussed, since a prima facie case had to be established. The plaintiff, while an invitee in defendant's store, slipped and fell in a puddle of water which she sought to show was probably spilled by boys wash-

ing the front windows of the store. In holding for the defendant proprietor, the court said:

> "There is no evidence that the agents, servants or employees of appellant caused the water to be on the floor of the store. There is no evidence that appellant knew of the presence of the water at the place where the fall occurred, nor is there any evidence that it was there for such a length of time that it was the duty of the appellant, in the exercise of ordinary care, to know of its presence and remove it. There is no showing that appellant had either actual or constructive notice of the presence of the water on the floor prior to the time Mrs. Martin fell. *Appellee failed to establish negligence upon the part of the appellant in any respect.*" *296 S. W. 2d 607, 608.* (Emphasis added.)

The following cases are ones in which the plaintiff obtained a jury verdict for personal injuries in a slip and fall case but were reversed as a matter of law in accordance with the applicable law of the State of Texas. Each of these authorities supports the decision by the Court of Appeals in the case at bar. These authorities are:

1. *Worth Food Markets, Inc. v. LeBaume (Tex. Civ. App., 1938, writ dismissed), 112 S. W. 2d 1089.* The plaintiff obtained a jury verdict for personal injuries as the result of a slip and fall accident caused by stepping on a banana lying at the entrance of defendant's store. The court stated that it was loath to disregard the jury's verdict and their right to find the facts, but that it was the court's duty to do so when the evidence was not sufficient to raise an issue of fact. After pointing out that there was no evidence that defendant had knowledge of the presence of the banana on its floor and that the evidence was insufficient to show that it had been in a

place making it a dangerous instrumentality for such a length of time that it became the duty of defendant to discover and remove it, the court reversed and rendered judgment for the defendant.

2. *Montfort v. West Texas Hotel Co. (Tex. Civ. App., 1938, writ refused), 117 S. W. 2d 811.* Plaintiff obtained a jury verdict as the result of his wife having stepped upon a drinking glass and falling down a flight of stairs. In affirming a judgment non obstante veredicto for the defendant, the court stated:

> "It cannot be presumed without evidence that the defendant had in fact such control of every part of the premises as to make it reasonable to infer that its servants, contrary to their duty, either put this glass upon the stairs or negligently allowed it to be there when they knew or should have known of its presence, rather than that it may have come to be there without their fault. * * * Such a presumption would contradict common experience, and common experience is the basis of presumptions of fact. There is no evidence that the glass had been in its dangerous position long enough to justify the inference that a failure to discover and remove the same was due to a want of proper care." *117 S. W. 2d 811, 812-813.*

3. *Smith v. Safeway Stores, Inc. (Tex. Civ. App., 1943, no writ noted), 167 S. W. 2d 1044.* Plaintiff testified that after picking up some cabbage at the vegetable counter in defendant's store, she was turning around to go elsewhere in the store and her feet slipped out from under her, causing a violent fall. She said as she was picked up from the floor she had a banana peel and carrot tops sticking to the heel of her shoe, and this was what caused her to fall. After a jury ver-

dict for the plaintiff, judgment non obstante veredicto was entered for defendant. In affirming such action and pointing out that an instructed verdict should have been granted, the court, in an opinion by Judge Speer, concluded:

> "We think the settled rule in such cases as the one before us is that a storekeeper is not the insurer of the safety of his invited customers, but that he owes to them the duty to use ordinary care to keep and maintain his premises in a reasonably safe condition for their use. The dangerous condition must have been known to the one charged with negligence, or the condition must have existed for such length of time or under such circumstances that he would or should have discovered it by the exercise of reasonable diligence (citing cases). There is a total absence of any testimony bringing appellee's liability within either of the conditions laid down in the rules announced." *167 S. W. 2d 1044, 1046.*

In addition to those authorities, the appellate courts of this State have sustained decisions by the trial court in granting an instructed verdict and thereby refusing to submit any issue to the jury in the following cases:

Graham v. F. W. Woolworth Co., Inc. (Tex. Civ. App., 1925, writ dismissed), 277 S. W. 223;

Hollingsworth v. American Trading Co. (Tex. Civ. App., 1941, no writ noted), 156 S. W. 2d 290;

Moss v. Safeway Stores, Inc. (5 Cir., 1950), 185 F. 2d 966.

The opinion by the Court of Appeals is in accord with each of these decisions which applied substantive law of the State of Texas in slip and fall cases.

One of the more recent cases which fully discusses the various duties involved in a slip and fall case and also supports Respondent's position concerning an instructed verdict is *Camp v. J. H. Kirkpatrick, 250 S. W. 2d 413.* That case also arises out of an accident on a rainy day when the plaintiff fell in the entranceway to a building where he worked. There being no proof of any previous incidents of slipping on the approach, or that the owner had actual knowledge that it was slippery, the trial court instructed a verdict for the defendant. Judge Pope, in the court's opinion, discusses the duty of both the store owner and the invitee. After pointing out that the store owner's duty is to use reasonable care to make and keep the premises free from danger to invitees when the danger is known or should be known by the proprietor, the court noted that the mere fact of falling does not prove the presence of danger any more than it proves clumsiness. The court concluded:

> "Without proof that the owner either knew or should have known of danger, there could be no breach of duty and negligence on his part." *250 S. W. 2d 413, 419.*

Even a casual reading of the above authorities will indicate that the Court of Appeals not only properly determined but aptly applied the substantive law of the State of Texas in determining the rights of the respective parties, as it was required to do, by this Honorable Court's opinion in *Erie R. Co. v. Tompkins, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188.*

Petitioner's Cases

In support of the contention that the Court of Appeals did not properly apply the applicable law of the State of

Texas, Petitioner relies on only two cases, neither of which is either applicable to or controlling of the issues raised.

In *Dawes v. J. C. Penney Co. (Tex. Civ. App., 1951, writ refused, n.r.e.), 236 S. W. 2d 624*, cited by Petitioner, the court held that the failure to use the rubber mats which the defendant owned, and which the porter had been instructed to use, raised a jury issue as to the alleged negligence in failing to provide such mats. The evidence in that case also established that the manager and porter had knowledge of other persons falling at the store entranceway, and thus they were charged with notice of its slick condition. Since Respondent in the case at bar had no notice of any danger, and no negligence was alleged with reference to furnishing mats, the holding in the *Dawes* case is not applicable.

The only other case cited by Petitioner, *S. H. Kress & Co. v. Dyer (Tex. Civ. App., 1932, reversed, no opinion), 49 S. W. 2d 986*, is one involving allegations that the defendant placed some kind of oil or grease upon its floor which caused the accident. In that case it was not disputed that the thing which allegedly caused the fall was placed upon the floor by the store owner. In the case at bar there is evidence that water had been tracked in around the door, but none that Respondent placed any foreign substance upon the floor. In any event, the reversal of the *Dyer* case by the Supreme Court of Texas set aside that decision, and the same is not authoritative law in the State of Texas.

To hold the Respondent liable under the facts of this case would be to place it in the position of an insurer of the cus-

tomer's safety while in its store, and would require the Respondent to keep its floor dry at every moment at every spot, on a rainy day. We do not understand such to be the applicable law under the existing facts. *Robinson v. S. H. Kress & Co. (U.S.D.A., E.D., N.C., 1956), 137 S. Supp. 19.*

There being no evidence that Respondent placed the water, about which Petitioner complains, upon its floor, and no evidence to show the period of time the water (if any) was present so as to charge Respondent with constructive notice, those cases cited above are controlling and no issue was made out for jury consideration. Instead, the trial court should have instructed a verdict for Respondent or granted its motion for judgment.

The matters in dispute not involving a federal statute or a federal question or important questions of legal significance in the construction of federal law, but being in complete accord with the substantive law of the State where the diversity case was tried, the Petition should be in all things denied.

Petitioner's Rights Under the Seventh Amendment to the Constitution Have Not Been Violated

In Texas, "Negligence is a failure to observe a legal duty" and "* * * to constitute negligence at all, there must be a violation of a duty owed to the very person claiming on the ground of negligence." *30-B Texas Jurisprudence 175.* And "Where the evidence is of such character that there is no room for reasonable and ordinary minds to differ as to the conclusion to be drawn from it the court not only may but

has a duty to direct a verdict." *Texas Law of Evidence, McCormick and Ray, 2d Ed., Vol. 1, p. 9.*

Since there was no evidence that Respondent placed any foreign substance upon its floor or knew that any such substance was there, and there being no evidence as to the period of time any foreign substance was upon its floor so as to show constructive knowledge of such condition upon the part of Respondent, there was no showing of negligence upon the part of the Respondent and it did not breach any legal duty owed to Petitioner. There being no issues to submit to the jury for their determination, the Court of Appeals correctly determined that the trial court should have instructed a verdict for Respondent in accordance with the substantive law of the State of Texas. See *Tompkins v. Erie R. Co. (2 Cir., 1938), 98 F. 2d 49, cert. den. 305 U. S. 637, 83 L. Ed. 410, rehearing denied 305 U. S. 673, 83 L. Ed. 436.*

Respondent in this case has shown that it was entitled to a directed verdict which clearly does not violate the Seventh Amendment to the Constitution, although it does deny jury verdict. See *Galloway v. United States, 319 U. S. 372, 87 L. Ed. 1458.*

Similar complaints of denial of trial by jury were made in a dissenting opinion in *Atlantic Coast Line Railroad Company v. Futch (5 Cir., 1958), 263 F. 2d 701.* In that case there was a jury verdict for the plaintiff resulting from injuries to an 18-month old child. The Court of Appeals, in reversing and rendering judgment for the railroad company, pointed out that there was no knowledge of the conditions

which would bring about liability, just as they did in the case at bar. Despite the dissenting opinion by Judge Reeves, citing *Byrd v. Blue Ridge Rural Co-op, 356 U. S. 525, 78 S. Ct. 893, 2 L. Ed. 2d 953*, upon which Petitioner relies in this case, this Honorable Court denied the petition for writ of certiorari, *360 U. S. 935, 79 S. Ct. 1456, 3 L. Ed. 1547.*

In a more recent case, *Rutherford v. Illinois Central Railroad Company (5 Cir., 1960), 276 F. 2d 330*, the district judge directed a verdict for the defendant railroad company upon grounds that the plaintiff, who was struck by a train, failed to show that the railroad was negligent. The Court of Appeals affirmed, with Judge Brown dissenting upon the ground that the action of the court took over the function of the jury. Again this Honorable Court denied the petition for writ of certiorari, *364 U. S. 922, 81 S. Ct. 288, 5 L. Ed. 261.*

It would seem that these most recent determinations by this Honorable Court are certainly recognitions that where there is "no evidence" to give rise to any legal duty, as determined by the Court of Appeals in this case, the issue is to be determined as a matter of law in accordance with the substantive law of the State where the accident occurred, and such a determination is not a denial of right to trial by jury.

CONCLUSION

The Court of Appeals correctly determined and properly applied the applicable law of the State of Texas. There being no federal law or federal question involved in this case, it is respectfully submitted that the petition for writ of certiorari should be denied. If for any reason the case is to be reversed,

and it is respectfully submitted that there is none, the same should be remanded to the Court of Appeals for their proper determination of issues as to the trial court's instructions which were raised in that court but never reached as a result of the determination made by that court.

Respectfully submitted,

WILLIAM L. KERR,
300 First National Bank
Building,
Midland, Texas.

MAX N. OSBORN,
300 First National Bank
Building,
Midland, Texas,
Counsel for Respondent.

TURPIN, KERR, SMITH & DYER,
P. O. Box 913
Midland, Texas,
Of Counsel.

CERTIFICATE OF SERVICE

Copy of the foregoing was deposited in the United States Mail at Midland, Texas, in properly stamped envelope addressed to counsel for Petitioner, viz., John J. Watts, Esq., P. O. Box 1031, Odessa, Texas, and Robert L. Ivy, Esq., Oil and Gas Building, Fort Worth, Texas, this day of September, 1961. This I certify.

WILLIAM L. KERR,
300 First National Bank
Building,
Midland, Texas.